# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1266

KENNEBEC LOG DRIVING CO., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITI**

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The United States brought this action to enjoin t petitioners from continuing to use the Kennebec Riv in Maine for log drives and to require them to cont bute to cleaning up the damage already done to t river by their log drives.

The objectionable features of the drives were that t floating logs and booms preempted the use of the surfa of the river and that logs and large quantities of ba which had sunk in the drives, covered the river bott with decaying material which consumed all the oxyg in the water, preventing aquatic life (see Pet. App. 2b).

The United States brought this action under Sectio 10 and 13 of the Rivers and Harbors Act of 18

30 Stat. 1151-1152, 33 U.S.C. 403 and 407.[1] that by placing booms in and across the riv trol the logs, as well as by allowing the log in the river, petitioners placed unauthorized o in the river in violation of Section 10 of th that by permitting logs and bark to sink to petitioners deposited refuse in violation of of the Act.

Petitioners' principal defense was that the 9, 1900, 31 Stat. 172, 33 U.S.C. 410, superse tire 1899 Act with respect to log driving a log drivers only to such regulations as th Engineers may impose, and none was imp The district court, in a decision rendered Court's opinion in *United States* v. *Pennsylv trial Chemical Corp.*, 411 U.S. 655, held t of 33 U.S.C. 410, neither Section 10 nor Se the Rivers and Harbors Act could apply to on the Kennebec River (Pet. App. A). The peals vacated the judgment of the district co that the 1900 Act superseded Section 10 Act (obstructions to navigation) by statuto ting log drives subject only to such regula Corps of Engineers might enact but that it did make Section 13 (deposit of refuse) inapp court remanded the case to the district cou mine whether the sunken logs and bark mately related to the actual conduct of n water that despite the facial applicability of it could not have been in the contemplation that it apply in such instances" (Pet. App. B,

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[1]Sections 10, 13, and 15 of the Rivers and Ha 33 U.S.C. 410, relied upon by petitioners, are se nent part at Pet. App. E, 1e-3e.

1. The 1899 Rivers and Harbors Act has three
tions relevant to this decision. Section 10 gene
prohibits obstructions to navigation not approved
advance by the Secretary of the Army. Section 13
larly prohibits deposits of refuse, except as permitte
the Secretary of the Army. Section 15, in con
flatly forbids anchoring vessels or floating log
navigable channels actively used by steamboats
manner which obstructs the passage of vessels.

The Act of May 9, 1900 (33 U.S.C. 410) is, b
terms, addressed to Section 15 of the Rivers and
bors Act. It modifies that section by removing the
lute prohibition of blocking navigation by log drive
authorizes the Secretary of the Army to prescribe
for the floating of logs on rivers where that is the
cipal method of navigation, in a manner to adjust
flicts between loggers and other persons using the
for navigation.

In our view, the court of appeals erred in ho
that the Act of 1900 superseded Section 10 as w
Section 15 of the 1899 Act, and its remand for
tional findings as to Section 13 is the kind of na
and cramped reading of the 1899 Act rejected by
Court in *United States* v. *Pennsylvania Industrial C*
*ical Corp., supra,* 411 U.S. at 669-670; *United Sta*
*Standard Oil Co.,* 384 U.S. 224, 226, 230; and *U*
*States* v. *Republic Steel Corp.,* 362 U.S. 482, 491.

We have not petitioned for certiorari, however
cause the decision does not conflict with that of any
court of appeals, and may prove on the remand t
district court to be sufficient to obtain the relief s
in this case.[2]

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[2]Moreover, the Scott Paper Company, the only presen
of the River for log drives, has announced its intention t
using the Kennebec for log drives by October 1, 1976. S
App. B, 4b.

2. There is, in any event, no support for petitioners' contention that the 1900 Act rendered Section 13 of the Rivers and Harbors Act facially inapplicable to log drives. The 1900 Act, as we have shown, is merely a partial repeal of Section 15 of the 1899 Act, which flatly prohibited log driving on waters navigated by steamboats where the drive would interfere with the steamboats. Sections 10 and 13 of the 1899 Act were not repealed, in whole or in part. Petitioners' contention that the 1900 Act made Section 13 of the 1899 Act wholly inapplicable to log drives would create a repeal by implication, which should not be imputed to Congress. See *Posadas* v. *National City Bank,* 296 U.S. 497, 503; *United States* v. *Jackson,* 302 U.S. 628, 631. The 1900 Act changed the balance between log driving and steam navigation with respect to obstructions to navigation. There is no inconsistency between that Act and a continued requirement that log drivers, as well as other users of the rivers and harbors, not deposit refuse in them without prior permission from the Corps of Engineers. See *United States* v. *Pennsylvania Industrial Chemical Corp., supra.*

Moreover, there has as yet been no finding of fact in this case on the necessity for the pollution connected with these log drives, or on whether, if petitioners would suffer the expense, logs could be driven without such violations of Section 13 of the River and Harbors Act. And, under the court of appeals' remand order, it is still open to petitioners to try to show that the pollution caused by log driving is so "intimately related to * * * navigation" that Congress could not have intended Section 13 to apply.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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